

1 UNITED STATES DISTRICT COURT  
2 WESTERN DISTRICT OF NEW YORK  
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5 - - - - - X  
6 UNITED STATES OF AMERICA ) 20CR6113

7 vs.

8 JOSEPH MCGRAIN ) Rochester, New York  
9 Defendant. ) April 20, 2021  
3:00 P.M.

10 - - - - - X  
11 **PLEA HEARING**

12 TRANSCRIPT OF PROCEEDINGS  
13 BEFORE THE HONORABLE ELIZABETH A. WOLFORD  
14 UNITED STATES DISTRICT JUDGE

15 JAMES P. KENNEDY, JR., ESQ.  
16 United States Attorney  
17 BY: MELISSA M. MARANGOLA, ESQ.  
18 Assistant United States Attorney  
19 6200 Federal Building  
20 Rochester, New York 14614

21 MARIANNE MARIANO, ESQ.  
22 Federal Public Defender  
23 BY: JEFFREY L. CICCONE, ESQ.  
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Appearing on behalf of the Defendant

26 **COURT REPORTER: Karen J. Clark, Official Court Reporter**  
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29 **Rochester, New York 14614**

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3 P R O C E E D I N G S

4 \* \* \*

15:10:24 7 THE CLERK: We're here in the matter of the  
15:10:25 8 United States versus Joseph McGrain, 20CR6113.

15:10:30 9 THE COURT: Good afternoon, everybody. We  
15:10:40 10 have Ms. Marangola here from the U.S. Attorney's Office;  
15:10:42 11 and Mr. Ciccone from the Federal Public Defender's  
15:10:42 12 Office.

15:10:45 13 And are you Joseph McGrain?

15:10:47 14 THE DEFENDANT: Yes.

15:10:47 15 THE COURT: And you're represented by Mr.  
15:10:50 16 Ciccone?

15:10:51 17 THE DEFENDANT: Yes.

15:10:51 18 THE COURT: And I understand that you intend  
15:10:53 19 to plead guilty to the indictment in this case without  
15:10:56 20 the benefit of a plea agreement, correct?

15:10:59 21 THE DEFENDANT: Yes, ma'am.

15:11:00 22 THE COURT: First of all, I want you to move  
15:11:07 23 the microphone so that it is closer to you so I can hear  
15:11:10 24 everything you are saying, especially with the mask  
15:11:12 25 because sometimes it becomes muffled.

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15:11:16 2 I need to ask you questions. The purpose of  
15:11:17 3 my questions is that I need to make sure that you  
15:11:20 4 understand everything you're agreeing to and you're  
15:11:22 5 entering into the plea in a knowing, voluntary and  
15:11:24 6 intelligent manner. So if at any point in time during  
15:11:28 7 the course of my questions you either do not understand  
15:11:31 8 me or you have a question for me or Mr. Ciccone, I want  
15:11:33 9 you to stop me and ask your question. Do you  
15:11:37 10 understand?

15:11:37 11 THE DEFENDANT: Yes, ma'am.

15:11:37 12 THE COURT: The goal is not to go through  
15:11:40 13 this quickly. The goal is to make sure you understand  
15:11:43 14 your rights and the rights that you're going to be  
15:11:45 15 giving up. Do you understand?

15:11:47 16 THE DEFENDANT: Yes, ma'am.

15:11:47 17 THE COURT: I'll ask you please stand and  
15:11:50 18 raise your right hand.

15:11:50 19 THE CLERK: Do you solemnly swear to tell  
15:11:50 20 the truth, the whole truth, and nothing but the truth so  
15:11:50 21 help you God?

15:11:50 22 THE DEFENDANT: Yes.

15:12:05 23 THE COURT: Okay. You can put it down.

15:12:06 24 What you just did, sir, is you took an oath to tell me  
15:12:09 25 the truth, therefore I'm going to expect you to answer

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15:12:12 2 my questions truthfully. If you do not answer my  
15:12:14 3 questions truthfully, you could be prosecuted for  
15:12:17 4 another crime called perjury. Do you understand that.

15:12:18 5 THE DEFENDANT: Yes, ma'am.

15:12:19 6 THE COURT: Could you state your full name  
15:12:20 7 for the record?

15:12:21 8 THE DEFENDANT: Joseph McGrain.

15:12:22 9 THE COURT: Do you have a middle name?

15:12:23 10 THE DEFENDANT: No, ma'am.

15:12:24 11 THE COURT: Where were you born?

15:12:25 12 THE DEFENDANT: I was born in Rochester, New  
15:12:27 13 York.

15:12:27 14 THE COURT: How old are you?

15:12:28 15 THE DEFENDANT: I'm 50 years old.

15:12:29 16 THE COURT: How far did you go in school?

15:12:31 17 THE DEFENDANT: Graduated.

15:12:33 18 THE COURT: Graduated from high school?

15:12:34 19 THE DEFENDANT: High school, ma'am.

15:12:35 20 THE COURT: Can you read, write and  
15:12:37 21 understand English?

15:12:37 22 THE DEFENDANT: Yes.

15:12:38 23 THE COURT: Are you currently being treated  
15:12:39 24 for any medical or mental health condition?

15:12:42 25 THE DEFENDANT: No, ma'am.

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15:12:42 2 THE COURT: Are you taking any prescription  
15:12:44 3 medication?

15:12:45 4 THE DEFENDANT: No, ma'am.

15:12:49 5 THE COURT: You seemed to hesitate there.

15:12:51 6 THE DEFENDANT: I was thinking I'm taking  
15:12:53 7 stuff for heartburn, that is not prescription, it is  
15:12:56 8 over the counter.

15:12:57 9 THE COURT: And are you under the influence  
15:12:58 10 of any drugs or alcohol?

15:12:59 11 THE DEFENDANT: No, ma'am.

15:12:59 12 THE COURT: Is there any reason that you are  
15:13:01 13 not able to understand what is happening here in court  
15:13:04 14 today?

15:13:05 15 THE DEFENDANT: No, ma'am.

15:13:05 16 THE COURT: Now, have you talked to Mr.  
15:13:08 17 Ciccone about the government's case against you, and by  
15:13:11 18 that I mean the proof that the government would have and  
15:13:13 19 if this case went to trial as we're scheduled to do  
15:13:16 20 right now on June 1st?

15:13:18 21 THE DEFENDANT: Yes.

15:13:18 22 THE COURT: Have you talked to him about  
15:13:19 23 that?

15:13:20 24 THE DEFENDANT: Yes, ma'am.

15:13:20 25 THE COURT: Have you also talked with Mr.

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15:13:22 2 Ciccone about what the likely result might be if the  
15:13:25 3 case went to trial?

15:13:26 4 THE DEFENDANT: Yes, ma'am.

15:13:26 5 THE COURT: Would it be fair to state that  
15:13:29 6 based on your discussions with your attorney, you  
15:13:31 7 believe pleading guilty to the indictment is in your  
15:13:35 8 best interest?

15:13:35 9 THE DEFENDANT: Yes, ma'am.

15:13:37 10 THE COURT: Now, Mr. Ciccone, maybe you  
15:13:39 11 could explain for us -- obviously, Mr. McGrain, more  
15:13:43 12 often than not when defendants plead guilty, they do so  
15:13:47 13 with the benefit of a plea agreement. So maybe, Mr.  
15:13:50 14 Ciccone, you could explain for the record why you have  
15:13:55 15 talked to your client about pleading guilty to the  
15:13:57 16 indictment.

15:13:58 17 MR. CICCONE: Sure, Judge. You mean as in  
15:14:00 18 why plead to the indictment instead of with a plea  
15:14:03 19 agreement?

15:14:03 20 THE COURT: Yes, exactly.

15:14:04 21 MR. CICCONE: Judge, simply because the  
15:14:06 22 indictment or, I'm sorry, the plea agreement is  
15:14:09 23 essentially a plea to the indictment. The last plea  
15:14:12 24 offer to Mr. McGrain was a plea to Count 1. Counts 2  
15:14:16 25 and 3 are obstruction counts, which are included within

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15:14:19 2 the Guidelines anyway for Count 1, so there is really no  
15:14:23 3 real advantage to having a plea agreement in this case.  
15:14:26 4 But, obviously, a plea agreement requires waiver of  
15:14:30 5 certain extra rights that Mr. McGrain does not have to  
15:14:34 6 waive without the plea agreement.

15:14:35 7 THE COURT: So, in other words, your  
15:14:36 8 assessment is that the plea offer did not really offer  
15:14:40 9 any benefit to Mr. McGrain as opposed to simply pleading  
15:14:44 10 to the indictment?

15:14:45 11 MR. CICCONE: Exactly, Judge.

15:14:46 12 THE COURT: And do you understand that, mr.  
15:14:48 13 McGrain?

15:14:48 14 THE DEFENDANT: Yes, ma'am.

15:14:49 15 THE COURT: And you agree with that  
15:14:50 16 assessment of your attorney?

15:14:52 17 THE DEFENDANT: Yes, ma'am.

15:14:53 18 THE COURT: Now, to the extent that you've  
15:14:55 19 had any questions about any of this, has Mr. Ciccone  
15:14:58 20 been able to answer them to your satisfaction?

15:15:00 21 THE DEFENDANT: Yes.

15:15:01 22 THE COURT: And have you had enough time to  
15:15:03 23 talk to Mr. Ciccone about this before coming here today?

15:15:07 24 THE DEFENDANT: Honestly, no.

15:15:09 25 THE COURT: And so you feel you need more

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15:15:11 2 time?

15:15:12 3 THE DEFENDANT: It's not, it's because of  
15:15:14 4 the COVID and Monroe County Jail.

15:15:16 5 THE COURT: And has that interfered with  
15:15:20 6 your ability --

15:15:20 7 THE DEFENDANT: It's actually interfered  
15:15:22 8 with a lot of us discussing stuff. There is just times,  
15:15:26 9 certain times that we can discuss stuff and certain  
15:15:30 10 times when I'm actually on a time limit, 15 minutes is  
15:15:34 11 all I get, and if the 15 minutes is up, it's up. They  
15:15:37 12 cut the phones off and you're out of the room and there  
15:15:43 13 is nothing he can do and nothing I can do because of the  
15:15:45 14 COVID and the situation we're in now.

15:15:47 15 THE COURT: Well, I'm not going to take a  
15:15:49 16 plea from anybody that is telling me they haven't had  
15:15:52 17 enough time to talk to their attorney about it.

15:16:00 18 THE DEFENDANT: We've had time to talk about  
15:16:02 19 this, yes. Just the case overall, we haven't had enough  
15:16:05 20 time to talk about at all.

15:16:06 21 THE COURT: I'm still not going to take a  
15:16:09 22 plea from somebody telling me that. What we can do and  
15:16:13 23 I'll ask the Marshals to hopefully try and accommodate  
15:16:16 24 this is to arrange, if you don't have time to meet with  
15:16:21 25 Mr. Ciccone at the jail, to have time to meet with him



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15:16:25 2 here in the holding cell to discuss anything that you  
15:16:28 3 need to.

15:16:30 4 THE DEFENDANT: We've discussed all of this  
15:16:32 5 earlier before coming in, and I agree with everything  
15:16:34 6 we've discussed here. Like I said, the overall, from  
15:16:37 7 the time that I was incarcerated all the way up until  
15:16:41 8 now, I haven't really had time to really talk to  
15:16:44 9 anybody, not just him, anybody.

15:16:47 10 MR. CICCONE: Judge, I don't want to put  
15:16:49 11 words in Mr. McGrain's mouth, because we've had this  
15:16:52 12 conversation multiple times. He thinks the case took  
15:16:57 13 longer than if we would have had time to talk for longer  
15:17:01 14 periods of time, not necessarily there is more he wants  
15:17:04 15 to talk about once we've gotten here.

15:17:07 16 THE COURT: Is that true?

15:17:08 17 THE DEFENDANT: That is what I'm trying to  
15:17:09 18 get to.

15:17:09 19 THE COURT: Are you telling me that you need  
15:17:11 20 to talk about the evidence more with Mr. Ciccone or that  
15:17:14 21 you need to discuss --

15:17:16 22 THE DEFENDANT: No.

15:17:16 23 THE COURT: -- the potential result here  
15:17:19 24 more with Mr. Ciccone before you move forward?

15:17:21 25 THE DEFENDANT: No.

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15:17:22 2 THE COURT: Do you want to move forward?

15:17:23 3 THE DEFENDANT: I want to move forward. I  
15:17:24 4 want to put this behind me and my family.

15:17:28 5 THE COURT: You're looking at an awful lot  
15:17:31 6 of time. It's a mandatory minimum of 10 years, I think,  
15:17:33 7 for Count 1.

15:17:34 8 THE DEFENDANT: I have to look at life if I  
15:17:36 9 go to trial, so take your pick.

15:17:39 10 THE COURT: Well, and that is because you  
15:17:41 11 believe you'll likely be convicted at trial, correct?

15:17:46 12 THE DEFENDANT: Yes.

15:17:46 13 THE COURT: Look it, I want you to be able  
15:17:50 14 to -- this is a big decision you have to make here. And  
15:17:53 15 I'm not suggesting by any means that the decision you're  
15:17:56 16 making is the wrong one. But my role is to make sure  
15:18:02 17 that anybody who appears in front of me and enters into  
15:18:05 18 a plea and pleads guilty to something, gives up their  
15:18:10 19 right to go to a trial, a constitutional right to go to  
15:18:14 20 a trial, my job is to make sure that they know what  
15:18:18 21 they're doing, and that they've had sufficient time to  
15:18:20 22 talk through the issues with their attorney.

15:18:23 23 THE DEFENDANT: I know what I'm doing.

15:18:24 24 THE COURT: You sure?

15:18:25 25 THE DEFENDANT: Positive.

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15:18:26 2 THE COURT: And you want to go forward with  
15:18:28 3 this today?

15:18:28 4 THE DEFENDANT: Yes.

15:18:29 5 THE COURT: Mr. Ciccone, are you confident  
15:18:32 6 that Mr. McGrain has had enough time to talk to you  
15:18:35 7 about this?

15:18:36 8 MR. CICCONE: Judge, I am in the sense of  
15:18:38 9 what I mentioned before. Overall, we've talked many,  
15:18:40 10 many times, albeit in 15-minute increments and sometimes  
15:18:45 11 here at the courthouse when we've had appearances. I  
15:18:48 12 don't have any doubt that we've spoken at length about  
15:18:51 13 the evidence in the case, the likelihood of or different  
15:18:56 14 strategies of what we might do as we prepared for trial,  
15:19:00 15 as we prepared for motions. And based on my previous  
15:19:06 16 conversations with Mr. McGrain, I didn't get the  
15:19:08 17 impression that that is what he meant. I think we've  
15:19:12 18 certainly talked about the case as much as I've talked  
15:19:16 19 to any client about any case. But it has been under  
15:19:21 20 less than ideal circumstances for sure. And, you know,  
15:19:24 21 when I meet with him at the jail, we have to talk  
15:19:26 22 through the phone through the glass or on the phone from  
15:19:29 23 the jail to my office, and it certainly hasn't been  
15:19:32 24 ideal. But I don't think there is any part of his case  
15:19:35 25 that we haven't discussed. But I'm happy to talk with

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15:19:39 2 him further to make sure.

15:19:41 3 THE COURT: Because what I can tell you Mr.

15:19:44 4 McGrain, I have a calendar on Monday next week. I can

15:19:47 5 put this down for a plea hearing on Monday if you think

15:19:50 6 that would make more sense for you to talk to Mr.

15:19:54 7 Ciccone and make sure that any issues that you need to

15:19:56 8 address have been resolved? If you tell me you don't

15:20:00 9 want to do that, that you're satisfied that you've had

15:20:02 10 enough time to talk to him.

15:20:04 11 THE DEFENDANT: I've had enough time to talk

15:20:06 12 with him.

15:20:07 13 THE COURT: You're sure about that?

15:20:08 14 THE DEFENDANT: I'm satisfied.

15:20:09 15 THE COURT: All right. Are you satisfied

15:20:10 16 with his advice and representation?

15:20:12 17 THE DEFENDANT: Yes.

15:20:12 18 THE COURT: All right. Any concerns, Ms.

15:20:15 19 Marangola, about going forward with this?

15:20:16 20 MS. MARANGOLA: No, your Honor.

15:20:17 21 THE COURT: And, Mr. Ciccone, you have no

15:20:19 22 concerns?

15:20:19 23 MR. CICCONE: No, Judge.

15:20:20 24 THE COURT: All right. Let me direct your

15:20:23 25 attention to a document that the government filed, which

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15:20:28 2 is the government's calculations of maximum sentence and  
15:20:32 3 sentencing Guideline range. Let me maybe back up a  
15:20:36 4 minute. In Federal Court, when a defendant gets  
15:20:40 5 sentenced, the judge first has to calculate what the  
15:20:43 6 Sentencing Guidelines would recommend for a sentence.  
15:20:46 7 That is a decision that I will make at the time of  
15:20:49 8 sentencing. I'll make that decision based in part on  
15:20:52 9 what I see in a Presentence Investigation Report that  
15:20:55 10 will be prepared by the Probation Department. In that  
15:20:59 11 report, the Probation Department will calculate an  
15:21:02 12 offense level and a criminal history category, and then  
15:21:05 13 those numbers will recommend a range for a sentence. Do  
15:21:08 14 you understand that?

15:21:11 15 THE DEFENDANT: Yes, ma'am.

15:21:11 16 THE COURT: Now, the Sentencing Guidelines  
15:21:13 17 are considered advisory, they are not mandatory. I also  
15:21:18 18 have to consider a number of other factors in connection  
15:21:20 19 with sentencing. I have to consider your background,  
15:21:23 20 the nature and circumstances of the crime that you pled  
15:21:25 21 guilty to. I have to consider various other factors,  
15:21:31 22 among other things, too, I have to look at what the  
15:21:34 23 mandatory minimum and maximum sentences that can be  
15:21:37 24 imposed. Do you understand that?

15:21:38 25 THE DEFENDANT: Yes.

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15:21:39 2 THE COURT: Now here the government has  
15:21:40 3 indicated that for Count 1, which is the charge of  
15:21:46 4 enticement of a minor in violation of Title 18 U.S.C.  
15:21:52 5 Section 2422(b), that there is a mandatory minimum  
15:21:56 6 prison sentence of 10 years, a maximum possible prison  
15:22:00 7 sentence of life, a fine of \$250,000, a mandatory \$100  
15:22:08 8 special assessment, and a supervised release term of at  
15:22:11 9 least five years and up to life. Those are the  
15:22:13 10 parameters of what the lowest and the highest that I can  
15:22:17 11 impose for the conviction on Count 1. Do you understand  
15:22:19 12 that?

15:22:20 13 THE DEFENDANT: Yes, ma'am.

15:22:20 14 THE COURT: Now, for Count 2, that is the  
15:22:25 15 attempted obstruction of justice charge, the maximum  
15:22:28 16 possible prison sentence is 20 years, a fine of  
15:22:33 17 \$250,000, there is another mandatory \$100 special  
15:22:36 18 assessment, and then the supervised release term is up  
15:22:38 19 to three years. Do you understand that?

15:22:39 20 THE DEFENDANT: Yes, ma'am.

15:22:41 21 THE COURT: And then for Count 3, an  
15:22:45 22 obstruction of justice charge, the maximum possible  
15:22:48 23 prison sentence is 20 years, a fine of \$250,000, there  
15:22:53 24 is a mandatory \$100 special assessment, and then the  
15:22:56 25 supervised release term is up to three years. Do you

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15:22:58 2 understand that?

15:22:59 3 THE DEFENDANT: Yes, ma'am.

15:23:01 4 THE COURT: Now, those \$100 special  
15:23:03 5 assessments, they may not seem like a big deal in the  
15:23:06 6 scheme of things, they are mandatory. I have to impose  
15:23:09 7 them as part of sentencing. Do you understand that?

15:23:11 8 THE DEFENDANT: Yes.

15:23:11 9 THE COURT: In addition, supervised release.  
15:23:15 10 Have you talked to Mr. Ciccone about supervised release?

15:23:18 11 THE DEFENDANT: Yes.

15:23:18 12 THE COURT: It's a type of -- that is what  
15:23:20 13 they call it in Federal Court, it's a type of probation  
15:23:24 14 or parole. And after any prison sentence, you'll be  
15:23:26 15 placed on supervised release for a certain number of  
15:23:29 16 years up to the maximum of life that is allowed for  
15:23:32 17 Count 1. And while on supervised release, you'll need  
15:23:34 18 to comply with certain terms and conditions that I set  
15:23:37 19 and that the probation office sets with my approval. Do  
15:23:40 20 you understand that?

15:23:40 21 THE DEFENDANT: Yes, ma'am.

15:23:42 22 THE COURT: Now, if while on supervised  
15:23:44 23 release it's proven by a preponderance of evidence that  
15:23:47 24 you violated those terms and conditions, then you could  
15:23:50 25 go back to prison without getting any credit for the

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15:23:53 2 time that you've already served on supervised release.

15:23:55 3 Do you understand that?

15:23:55 4 THE DEFENDANT: Yes, ma'am.

15:24:06 5 THE COURT: Now, let's take a look at the  
15:24:09 6 Guideline calculations that the government has at least  
15:24:12 7 calculated. If you look at paragraph 7 of the  
15:24:15 8 government's filing at docket 71. The government, in  
15:24:21 9 this document, Mr. McGrain, is setting forth what it  
15:24:25 10 believes the Guideline calculation will provide. This  
15:24:28 11 doesn't bind me, it doesn't bind you. Ultimately I need  
15:24:31 12 to make my own determination about that, and I'll do  
15:24:34 13 that at the time of sentencing. But this, at least,  
15:24:37 14 let's us know what the government's present position is  
15:24:40 15 in terms of what the Guidelines provide.

15:24:43 16 THE DEFENDANT: Yes, ma'am.

15:24:44 17 THE COURT: And the government may change  
15:24:45 18 its position up to the time of sentencing because,  
15:24:48 19 again, there is no plea agreement here. They are  
15:24:51 20 setting forth what they believe are the correct  
15:24:53 21 calculations. So for Count 1, they believe there is a  
15:24:56 22 base offense level of 28. They believe then in  
15:24:59 23 paragraph 8 that there should be a two-level increase  
15:25:02 24 because the use of a computer or an interactive computer  
15:25:05 25 service was used to persuade, induce, entice, coerce or



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facilitate the travel of the minor. And then a two-level increase because of the commission of a sex act. And then the government also believes there should be another two-level increase because of the obstruction of justice. And then the government believes, as set forth in paragraph 10, that there should be a five-level increase because the underlying offense is a chapter 117 crime, so that your adjusted offense level for Count 1 would be a 39. Do you understand that is the government's position?

THE DEFENDANT: Yes, ma'am.

THE COURT: And then counts 2 and 3, which are the obstruction of justice charges, are grouped together. Government believes that they provide a base offense level of 14. So, under the Guidelines, if these numbers are correct, you would rely on the offense level calculated for Count 1, which is a 39. Do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: Now, if in fact I determine at the time of sentencing that you truly are remorseful for your conduct and that you have accepted responsibility, then the Guidelines would provide that there should be a three-level increase in the offense level, which,

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15:26:23 2 according to the government's calculations, would take  
15:26:25 3 your offense level down to a 36. Do you understand  
15:26:28 4 that?

15:26:28 5 THE DEFENDANT: Yes, ma'am.

15:26:30 6 THE COURT: Now, you don't get acceptance of  
15:26:32 7 responsibility automatically by coming in here and  
15:26:35 8 pleading guilty. Remember I said that you're going to  
15:26:37 9 be interviewed by the probation department and they are  
15:26:39 10 going to prepare a Presentence Investigation Report?

15:26:42 11 THE DEFENDANT: Yes, ma'am.

15:26:43 12 THE COURT: Well, I have to be satisfied,  
15:26:45 13 Mr. McGrain, at the time of sentencing, based in part on  
15:26:48 14 what I see in the report, that you truly are remorseful  
15:26:51 15 for your conduct and that you have accepted  
15:26:53 16 responsibility. Do you understand that?

15:26:54 17 THE DEFENDANT: Yes, ma'am.

15:26:54 18 THE COURT: If you were to commit another  
15:26:56 19 crime between now and the time of sentencing, that could  
15:26:59 20 lead me to conclude that you have not accepted  
15:27:02 21 responsibility. Do you understand that?

15:27:03 22 THE DEFENDANT: Yes, ma'am.

15:27:05 23 THE COURT: And then the government believes  
15:27:07 24 that you are a criminal history category I, which is the  
15:27:10 25 lowest level that you can have. Do you understand that?

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15:27:12 2 THE DEFENDANT: Yes, ma'am.

15:27:13 3 THE COURT: So if these numbers are correct  
15:27:16 4 and you have an offense level of 36, and a criminal  
15:27:19 5 history category of I, as set forth in paragraph 18 of  
15:27:24 6 the government's filing, the Guidelines would recommend  
15:27:26 7 a prison sentence of 188 to 235 months, a fine of  
15:27:35 8 \$40,000 up to \$250,000, and a supervised release term of  
15:27:39 9 five years up to life. Do you understand that?

15:27:40 10 THE DEFENDANT: Yes, ma'am.

15:27:41 11 THE COURT: Now, I want to make sure you're  
15:27:43 12 clear on a couple of things, Mr. McGrain. First of all,  
15:27:46 13 once you plead guilty, you cannot take your plea back.  
15:27:49 14 And the reality is I could sentence you up to the  
15:27:52 15 maximum allowed under the law, which includes life in  
15:27:55 16 prison. Do you understand that?

15:27:56 17 THE DEFENDANT: Yes, ma'am.

15:27:57 18 THE COURT: And in addition, as I've said,  
15:27:59 19 these are the government's Guideline calculations or  
15:28:02 20 what the government believes are the Guideline  
15:28:03 21 calculations right now. I'm going to make my own  
15:28:07 22 determination about that. And I'll do that at the time  
15:28:09 23 of sentencing. Do you understand that?

15:28:10 24 THE DEFENDANT: Yes.

15:28:11 25 THE COURT: But, ultimately, the Guidelines

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15:28:13 2 are just recommendations. They are not mandatory. What  
15:28:16 3 is mandatory here is that I impose this mandatory  
15:28:20 4 minimum prison sentence of 10 years for the conviction  
15:28:24 5 on Count 1. Do you understand that?

15:28:26 6 THE DEFENDANT: Yes, ma'am.

15:28:27 7 THE COURT: Do you have any questions for me  
15:28:29 8 or Mr. Ciccone about anything that we've talked about up  
15:28:32 9 to this point?

15:28:34 10 THE DEFENDANT: No, ma'am.

15:28:38 11 THE COURT: Let me talk to you about the  
15:28:40 12 forfeiture allegations in the indictment, too. Again,  
15:28:43 13 it may not seem like a big deal in the scheme of things,  
15:28:47 14 but the indictment has a forfeiture allegation where it  
15:28:50 15 seeks to forfeit the cell phone, that is the Samsung  
15:28:57 16 Galaxy cell phone. Do you understand that?

15:28:57 17 THE DEFENDANT: Yes.

15:28:58 18 THE COURT: Now, normally before the  
15:29:00 19 government can take property that belongs to an  
15:29:02 20 individual, that individual has the right to certain  
15:29:06 21 notice, you actually could go to a jury trial on that  
15:29:09 22 issue. But one of the questions that I'll be asking you  
15:29:12 23 is whether you admit to the forfeiture allegation that  
15:29:16 24 is part of this indictment. Do you understand that?

15:29:17 25 THE DEFENDANT: Yes, ma'am.

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15:29:19 2 THE COURT: Let me talk to you now, Mr.  
15:29:21 3 McGrain, about the rights that you're going to be giving  
15:29:23 4 up by pleading guilty as opposed to going to trial.  
15:29:26 5 First of all, do you understand that you do not need to  
15:29:29 6 plead guilty to anything. If you wanted, you could go  
15:29:32 7 forward with a jury trial that we have scheduled to  
15:29:36 8 start on June 1. Do you understand that?

15:29:37 9 THE DEFENDANT: Yes, ma'am.

15:29:38 10 THE COURT: And at that trial, as well as at  
15:29:40 11 all critical stages of this proceeding, you'd have the  
15:29:43 12 right to continued representation by counsel. Do you  
15:29:46 13 understand that?

15:29:46 14 THE DEFENDANT: Yes, ma'am.

15:29:48 15 THE COURT: You would not have the burden to  
15:29:50 16 prove anything at this trial. The sole burden of proof  
15:29:53 17 at this trial would be on the government who would be  
15:29:57 18 responsible for calling witnesses and putting evidence  
15:29:59 19 into the record. Do you understand that?

15:30:00 20 THE DEFENDANT: Yes, ma'am.

15:30:01 21 THE COURT: Your attorney on your behalf  
15:30:03 22 could challenge any of the evidence that the government  
15:30:05 23 sought to introduce and he could confront and cross  
15:30:10 24 examine any of the witnesses who testified. Do you  
15:30:11 25 understand that?

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15:30:11 2 THE DEFENDANT: Yes, ma'am.

15:30:13 3 THE COURT: You'd have the right, if you  
15:30:14 4 wanted to, to testify on your own behalf or you could  
15:30:19 5 choose not to do that. Do you understand that?

15:30:21 6 THE DEFENDANT: Yes, ma'am.

15:30:21 7 THE COURT: You also would have the right to  
15:30:23 8 put in a defense case. You could call witnesses, compel  
15:30:27 9 them to attend the trial, put in your own evidentiary  
15:30:30 10 proof or you could chose not to do that. Do you  
15:30:32 11 understand that?

15:30:32 12 THE DEFENDANT: Yes, ma'am.

15:30:33 13 THE COURT: And if you chose not to testify  
15:30:34 14 or if you chose not to put in any type of a defense  
15:30:37 15 case, I would specifically instruct the jury that they  
15:30:40 16 could not in any way consider that as evidence of your  
15:30:43 17 guilty or evidence of anything else for that matter. Do  
15:30:46 18 you understand that?

15:30:46 19 THE DEFENDANT: Yes, ma'am.

15:30:48 20 THE COURT: In addition, the jury would have  
15:30:50 21 to consider each charge against you separately and find  
15:30:54 22 that the government had proven each element of the  
15:30:56 23 charge under consideration beyond a reasonable doubt.  
15:30:59 24 Do you understand that?

15:31:00 25 THE DEFENDANT: Yes, ma'am.

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15:31:02 2 THE COURT: And why don't you, if you would,  
15:31:04 3 turn to paragraph five of the government's statement. I  
15:31:07 4 guess, first of all, Mr. Ciccone, do you disagree with  
15:31:10 5 the elements that are set forth here by the government?

15:31:13 6 MR. CICCONE: No, your Honor.

15:31:14 7 THE COURT: Okay. So let's go through each  
15:31:17 8 of the counts and each of the elements, Mr. McGrain,  
15:31:21 9 that the government would have to prove at trial. So  
15:31:23 10 for Count 1, before you could be convicted, the  
15:31:28 11 government would have to prove beyond a reasonable doubt  
15:31:31 12 that you knowingly used or attempted to use a facility  
15:31:34 13 or means of interstate commerce to persuade, induce,  
15:31:38 14 entice or coerce an individual under the age of 18 to  
15:31:42 15 engage in sexual activity. No. 2, you believed that  
15:31:47 16 such individual was less than 18 years of age. And  
15:31:50 17 three, you could have to been charged with a criminal  
15:31:53 18 offense for engaging in the sexual activity. Do you  
15:31:58 19 understand those are the elements that the government  
15:31:59 20 would have to prove beyond a reasonable doubt before you  
15:32:01 21 could be convicted of Count 1?

15:32:03 22 THE DEFENDANT: Yes, ma'am.

15:32:04 23 THE COURT: And then for Count 2, the  
15:32:06 24 government would have to prove, beyond a reasonable  
15:32:09 25 doubt, No. 1, that you knowingly used intimidation,

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15:32:12 2 threatened or corruptly persuaded a witness or attempted  
15:32:16 3 to do so; and two, that you acted knowingly and with the  
15:32:20 4 intent to influence the testimony of the witness in an  
15:32:24 5 official federal proceeding. Do you understand those  
15:32:30 6 are the elements that the government would have to prove  
15:32:32 7 beyond a reasonable doubt before you could be convicted  
15:32:33 8 of Count 2?

15:32:34 9 THE DEFENDANT: Yes, ma'am.

15:32:35 10 THE COURT: And then for Count 3, the  
15:32:37 11 government would have to prove, No. 1, that you altered  
15:32:40 12 or falsified or destroyed or concealed any record,  
15:32:45 13 document or object that can be used to record or  
15:32:48 14 preserve information; number two, that you acted  
15:32:52 15 knowingly; and three, that you acted with the intent to  
15:32:55 16 impede, obstruct or influence an investigation within  
15:32:59 17 the jurisdiction of or in relation to a department or  
15:33:02 18 agency of the United States Government. Do you  
15:33:05 19 understand those are the elements that the government  
15:33:06 20 would have to prove beyond a reasonable doubt before you  
15:33:10 21 could be convicted of Count 3?

15:33:14 22 THE DEFENDANT: Yes, ma'am.

15:33:15 23 THE COURT: In addition, the jury would have  
15:33:17 24 to be unanimous in its verdict. In other words, all 12  
15:33:20 25 people would have to be in agreement that the government



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15:33:22 2 met its burden of proof. Do you understand that?

15:33:24 3 THE DEFENDANT: Yes, ma'am.

15:33:25 4 THE COURT: Do you understand that you're  
15:33:26 5 going to be giving up these rights?

15:33:28 6 THE DEFENDANT: Yes, ma'am.

15:33:29 7 THE COURT: And do you understand that a  
15:33:30 8 plea of guilty is the same as if a jury found you guilty  
15:33:33 9 after trial?

15:33:34 10 THE DEFENDANT: Yes, ma'am.

15:33:35 11 THE COURT: Now, with a felony conviction,  
15:33:37 12 you may lose certain civil rights, such as the right to  
15:33:41 13 vote, the right to hold certain licenses or offices, the  
15:33:44 14 right to sit on a jury. Do you understand that?

15:33:46 15 THE DEFENDANT: Yes, ma'am.

15:33:49 16 THE COURT: Has anyone coerced you or  
15:33:51 17 threatened you in any way to get you to plead guilty?

15:33:54 18 THE DEFENDANT: No, ma'am.

15:33:55 19 THE COURT: Are you pleading guilty because  
15:33:57 20 based on your discussions with your attorney, you  
15:33:59 21 believe it's in your best interest to do so?

15:34:01 22 THE DEFENDANT: Yes.

15:34:02 23 THE COURT: Are you pleading guilty because  
15:34:03 24 you are guilty?

15:34:04 25 THE DEFENDANT: Yes.

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15:34:05 2 THE COURT: Have you answered my questions  
15:34:07 3 truthfully?

15:34:07 4 THE DEFENDANT: Yes, ma'am.

15:34:08 5 THE COURT: Do you have any question for me  
15:34:09 6 or Mr. Ciccone?

15:34:10 7 THE DEFENDANT: No, ma'am.

15:34:12 8 THE COURT: All right. I do find, based on  
15:34:15 9 Mr. McGrain's answers to my questions, that he is  
15:34:18 10 entering into this plea in a knowing, voluntary and  
15:34:20 11 intelligent manner. Now, before I can accept your pleas  
15:34:24 12 though, Mr. McGrain, you're going to have to tell me  
15:34:27 13 what you did. I need to make sure there is a factual  
15:34:29 14 basis for your plea. So let's go through each count  
15:34:35 15 separately.

15:34:35 16 And specifically for enticement of a minor,  
15:34:40 17 can you tell me what you did that is causing you to  
15:34:43 18 plead guilty?

15:34:43 19 THE DEFENDANT: I text messaged my  
15:34:47 20 girlfriend's daughter. I was going through a divorce at  
15:34:52 21 the time. Me and her ended up becoming close and I  
15:34:56 22 started to have feelings for her. And so we were  
15:34:59 23 texting messages back and forth. And I, we were texting  
15:35:02 24 on how much we cared about each other. And I sent her  
15:35:08 25 numerous texts saying how much I loved her.

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15:35:11 2 THE COURT: How old -- by "her" you're  
15:35:14 3 referring to the daughter?

15:35:15 4 THE DEFENDANT: Yes.

15:35:16 5 THE COURT: And how old was she?

15:35:17 6 THE DEFENDANT: At the time it all started,  
15:35:19 7 she was 15; she just turned 15.

15:35:22 8 THE COURT: And you knew she was less than  
15:35:23 9 18 years of age?

15:35:24 10 THE DEFENDANT: Yes, ma'am.

15:35:25 11 THE COURT: And did you have sexual  
15:35:27 12 relations with her?

15:35:28 13 THE DEFENDANT: No, ma'am.

15:35:30 14 THE COURT: You did not?

15:35:31 15 THE DEFENDANT: Ma'am, I didn't have sex  
15:35:33 16 with her, no. I can't sit here and tell you I did  
15:35:36 17 because I didn't. We were waiting until she was 18.

15:35:47 18 MS. MARANGOLA: It's not an element of the  
15:35:49 19 crime that is necessary, but, in terms of -- I will --  
15:35:53 20 that will be a sentencing enhancement that I will submit  
15:35:58 21 that I'll prove to you at sentencing that that happened,  
15:36:00 22 yes. But, in terms of the communications, to plead  
15:36:05 23 guilty to enticement of a minor, it has to go beyond  
15:36:10 24 love. He has to be admitting to the chats. I didn't  
15:36:13 25 bring them down, I have them upstairs, if that is

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15:36:16 2 required, where he talks about wanting to feel her naked  
15:36:20 3 body, have sex with her, sexual communications, Judge,  
15:36:24 4 which would be sufficient. He is enticing her to engage  
15:36:28 5 in that sexual activity. And we're alleging that would  
15:36:31 6 be any sexual conduct with someone under the age of 18.  
15:36:36 7 He has to admit more than him saying "I love you" or "I  
15:36:40 8 loved you."

15:36:41 9 THE COURT: So the first element of Count 1  
15:36:43 10 is that you have to admit that you knowingly used or  
15:36:47 11 attempted to use a facility or means of interstate  
15:36:50 12 commerce.

15:36:52 13 THE DEFENDANT: Yes. I sent text messages  
15:36:54 14 saying that I wanted to have sex with her. I couldn't  
15:36:57 15 wait until she was actually old enough to have sex with  
15:37:01 16 one another.

15:37:01 17 THE COURT: Well, did you knowingly try to  
15:37:05 18 persuade, induce, entice or coerce her to engage in  
15:37:08 19 sexual activity.

15:37:10 20 THE DEFENDANT: No. Even in the messages  
15:37:12 21 that they sent, that is exactly what I said. "I can't  
15:37:15 22 wait to feel your naked body against mine." I didn't  
15:37:19 23 coerce her. That is what I said, word for word. And I  
15:37:24 24 even said and there is even in after the messages where  
15:37:27 25 I even told her that I will wait until she is 18 because

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15:37:33 2 15 years in prison is not worth having sex with her. I  
15:37:36 3 was willing to wait. Because, like I said, I loved this  
15:37:40 4 girl. It wasn't lust, it wasn't just for sex. I was  
15:37:46 5 going through a messy divorce with my wife, this girl  
15:37:49 6 was there. She was there to comfort me and she was  
15:37:52 7 there to talk to. And she made me feel good. She made  
15:37:57 8 me feel young. So we were doing what the young people  
15:38:00 9 do, sending text messages back and forth to one another.  
15:38:05 10 And that is what I told her, "I can't wait to hold your  
15:38:08 11 naked body against mine. I can't wait until we can have  
15:38:12 12 sex." Because that is what we were doing, we were  
15:38:17 13 waiting. Why she is telling everyone we had sex, I  
15:38:21 14 don't know. The only thing I can conclude is because I  
15:38:23 15 came to my senses and figured she is still a child and I  
15:38:27 16 didn't want to ruin her life. I wanted to move on and  
15:38:31 17 get out of the house as quickly as I could. The moment  
15:38:34 18 I did that, that is when everything blew up. But I'm  
15:38:39 19 not going to sit here and lie and say I had sex with  
15:38:44 20 this girl when I did not. I clearly did not. I  
15:38:47 21 wouldn't do that.

15:38:50 22 If that means this is all thrown away, then  
15:38:53 23 I'm going to have to throw it away. I'm not going to  
15:38:57 24 admit to having sex with her, I didn't.

15:39:00 25 THE COURT: You're not admitting to

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15:39:03 2 attempting to persuade, induce, coerce or entice her.

15:39:06 3 THE DEFENDANT: No. All I did is -- read  
15:39:09 4 the text messages.

15:39:12 5 THE COURT: I think the jury will read the  
15:39:14 6 text messages.

15:39:15 7 THE DEFENDANT: I said, "I can't wait until  
15:39:17 8 I hold your naked body." And "I can't wait until we  
15:39:21 9 have sex." I've read those text messages over and over  
15:39:26 10 and over. I read them over and over. I've been going  
15:39:29 11 through them every night. Not one text message talks  
15:39:33 12 about us having sex, not one.

15:39:37 13 THE COURT: You don't think "holding your  
15:39:39 14 naked body" is talking about having sex?

15:39:42 15 THE DEFENDANT: That is talking about having  
15:39:44 16 sex, but that doesn't mean we've had sex.

15:39:47 17 THE COURT: So you're denying that you used  
15:39:51 18 the text messages to try and persuade, induce, entice or  
15:39:56 19 coerce her to engage in sexual activity.

15:39:58 20 THE DEFENDANT: No. I did entice her and  
15:40:01 21 was coercing her to having sex, to have it in the  
15:40:05 22 future. That doesn't mean I was having sex with her.  
15:40:08 23 No. In the future, when we were 18 -- when she was 18.  
15:40:12 24 That was the game plan.

15:40:13 25 THE COURT: But she was 15 at the time.

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15:40:15 2 THE DEFENDANT: At the time, she just turned  
15:40:18 3 15. Actually, that text message, she was 16 at that  
15:40:23 4 time when we -- when we started to talk about the sex is  
15:40:27 5 when she was 16.

15:40:28 6 THE COURT: How do we get around the element  
15:40:30 7 that he could have been charged with a criminal offense  
15:40:33 8 for engaging in sexual activity. I know that he doesn't  
15:40:37 9 have to have engaged in sex, but he has to have intended  
15:40:41 10 to entice her to engage in sex at the time he is engaged  
15:40:46 11 in the communications.

15:40:47 12 MS. MARANGOLA: Of course, Judge. And the  
15:40:48 13 communications, I regret not having brought the Facebook  
15:40:52 14 messages down here. There are messages that he says  
15:40:55 15 "FU, the sex wasn't worth it."

15:41:00 16 THE COURT: Wait a minute, let Ms. Marangola  
15:41:02 17 speak.

15:41:03 18 MS. MARANGOLA: So the government's theory,  
15:41:04 19 based on the evidence I presented to the jury, is he did  
15:41:06 20 have sex with her. He consistently had sex with her.

15:41:10 21 THE COURT: And that is what she claims as  
15:41:13 22 well?

15:41:13 23 MS. MARANGOLA: Yes.

15:41:13 24 THE COURT: And it lasted for over a year?

15:41:15 25 MS. MARANGOLA: Yes. Right before she

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15:41:17 2 turned 15, it started when she was 14 and went until she  
15:41:21 3 was 16. And the messages on her phone were uncovered by  
15:41:27 4 family members and law enforcement was called. That is  
15:41:30 5 how the case came to light. The government's theory, he  
15:41:33 6 wasn't telling her to wait until they were 18. He was  
15:41:36 7 communicating with her over Facebook, text messages,  
15:41:40 8 SnapChat, all of the above. And they were discussing  
15:41:43 9 having sex tomorrow during school. It wasn't to wait  
15:41:48 10 when they were 18. That would not be a crime. So what  
15:41:52 11 he is colloquying to, at this point, it's the  
15:41:55 12 government's position that is not criminal conduct for  
15:41:58 13 which he could be guilty to Count 1.

15:42:01 14 THE COURT: It doesn't seem like there is a  
15:42:06 15 plea to Count 1. I assume you want to go forward with  
15:42:09 16 Count 2 and 3, so that won't make sense.

15:42:12 17 I'm not going to accept your plea. We're  
15:42:14 18 not going to go forward, Mr. McGrain. We'll have a jury  
15:42:17 19 decide as to whether or not you're in fact guilty as  
15:42:20 20 charged in the indictment and we'll see how that gets  
15:42:25 21 resolved.

15:42:26 22 We have a status conference set for next  
15:42:29 23 Friday. I know, Ms. Marangola and Mr. Ciccone,  
15:42:32 24 indicated in by and large you're fine with the form of  
15:42:36 25 the questionnaire that Judge Geraci usually uses. I



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15:42:40 2 want to take another look at it and see if there is  
15:42:43 3 anything should be altered because of this case or the  
15:42:46 4 nature of the case, and I'll circulate that to everybody  
15:42:49 5 before next Wednesday and we'll talk more specifically  
15:42:52 6 about the jury selection, really, next Wednesday, just  
15:42:55 7 what my thoughts are in terms of how we'll handle that  
15:42:58 8 and give them the precautions that we have to utilize.

15:43:03 9 MS. MARANGOLA: Yes.

15:43:04 10 THE COURT: Anything else, Mr. Ciccone?

15:43:05 11 MR. CICCONE: No, Judge. Thank you.

15:43:06 12 THE COURT: Ms. Marangola?

15:43:07 13 MS. MARANGOLA: No, Judge. Thank you.

15:43:08 14 THE COURT: Have a good afternoon,  
15:43:10 15 everybody.

15:43:11 16 MR. CICCONE: Thank you, your Honor.

15:43:12 17 THE DEFENDANT: Thank you.

18 \* \* \*

19 CERTIFICATE OF REPORTER

20  
21 I certify that the foregoing is a correct transcript  
22 of the record of proceedings in the above-entitled  
23 matter.

24 S/ Karen J. Clark, RPR

25 Official Court Reporter

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